

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTONKATHLEEN M. MEFFORD-WHEAT,  
CHRISTOPHER P. MEFFORD,

Plaintiffs,

vs.

LT. KAREN JASPER,

Defendant.

NO. CV-11-0465-CI

ORDER RESERVING RULING ON  
DEFENDANT'S MOTION TO DISMISS  
PURSUANT TO FED. R. CIV. P. 12(c)

BEFORE THE COURT is Defendant Karen Jasper's Motion to Dismiss and Stay Discovery. (ECF No. 21.) Plaintiffs Kathleen M. Mefford-Wheat and her son, Christopher P. Mefford, filed this *pro se* civil rights Complaint pursuant to 42 U.S.C. § 1983. They seek injunctive relief and monetary damages for violations of their constitutional rights under the Sixth, Eighth, and Fourteenth Amendments. ECF No. 1 at 6. Also included in the Complaint are allegations construed by the court as claims for equal protection, due process and Miranda violations. (ECF No. 1 at 3-5.)

Defendant Karen Jasper, an employee of the Department of Corrections of the State of Washington (DOC) is represented by Assistant Attorney General, Corrections Division, Brian J. Considine. Lt. Jasper was a DOC officer at Airway Heights Correctional Center at the time of the alleged violations. Defendant moves for judgment on the pleadings, arguing facts alleged in the Complaint do not state a claim for which relief can be granted under Section 1983. Defendant requests dismissal with

ORDER RESERVING RULING ON DEFENDANT'S MOTION  
TO DISMISS PURSUANT TO FED. R. CIV. P. 12(c) - 1

1 prejudice and a stay of discovery until her Motion is resolved.  
2 (ECF No. 21, 22.) The parties have consented to proceedings before  
3 a magistrate judge. (ECF No. 16.)

#### 4 STANDARD OF REVIEW

5 A motion for judgment on the pleadings is reviewed under  
6 standards equivalent to a motion for dismissal for failure to state  
7 a claim under FED. R. CIV. P. 12(b)(6). The court may consider  
8 exhibits attached to a complaint without converting a motion to  
9 dismiss to one for summary judgment. *Parks School of Business, Inc.*  
10 *v. Symington*, 51 F.3d 1480, 1484 (9<sup>th</sup> Cir. 1995). Failure to  
11 present enough facts to state a claim for relief that is plausible  
12 on the face of the complaint will subject that complaint to  
13 dismissal. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 562 (2007)  
14 "Dismissal can be based on the lack of a cognizable legal theory or  
15 the absence of sufficient facts alleged under a cognizable theory."  
16 *Balistreri v. Pacifica Police Dep't*. 901 F.2d 696, 699 (9<sup>th</sup> cir.  
17 1990).

18 "For purposes of a motion to dismiss, the material allegations  
19 of the complaint are taken as admitted." *Jenkins v. McKeithen*, 395  
20 U.S. 411, 421 (1969). The court construes a *pro se* complaint  
21 liberally in favor of the plaintiff; however, the court will not  
22 supply an essential fact that is not included in the plaintiff's  
23 complaint. *Pena v. Gardner*, 976 F.2d 469, 471 (9<sup>th</sup> Cir. 1992)(*quoting*  
24 *Ivey v. Board of Regents of Univ. Of Alaska*, 673 F.2d 266, 268 (9<sup>th</sup>  
25 Cir. 1982)). Conclusory allegations of violations of constitutional  
26 rights by a prison official are insufficient to withstand a motion  
27 to dismiss. *Id.*

**STATEMENT OF THE CASE**

Material allegations in the Complaint indicate Plaintiffs were visiting an inmate at ACCH on October 23, 2011. After being asked to leave the visiting room by a prison officer, Plaintiffs were approached by an officer who asked them to speak with Lt. Jasper at the desk. Lt. Jasper asked them for identification and asked them where they lived and how long they had lived in Washington. Plaintiff told Lt. Jasper they had moved from California to Washington in August. (ECF No. 1 at 2.) Lt. Jasper asked to speak with Plaintiff Kathleen Mefford-Wheat away from her son. Lt. Jasper informed Plaintiff the video recording of her and her son's visit with the inmate shows Plaintiff going to the bathroom, returning to the visiting room, and passing something to the inmate in a juice container they shared. Lt. Jasper told Ms. Mefford-Wheat she was concerned about the inmate's stomach and safety after having ingested whatever had been passed to the inmate in the juice container. In response to Lt. Jasper's requests that Plaintiff tell the truth about what was given to the inmate, Plaintiff told Lt. Jasper she did not do anything and she was telling the truth. Lt. Jasper then told Plaintiff she would be calling the police regarding the incident and told Plaintiff she "needed to think about the property I have in California." (ECF No. 1 at 2-3.) Plaintiff told Lt. Jasper she did not understand what Lt. Jasper was talking about. *Id.* at 3. Plaintiffs do not allege they were detained, or arrested, or charged with a crime after the reported encounter with Defendant.

**42 U.S.C. § 1983**

To state a claim under 42 U.S.C. § 1983, Plaintiff must allege

(1) the violation of a right secured by the Constitution and laws of the United States, and (2) the deprivation was committed by a person acting under color of state law. *Parratt v. Taylor*, 451 U.S. 527, 535 (1981)(overruled in part on other grounds, *Daniels v. Williams*, 474 U.S. 327, 330-31 (1986)); *Leer v. Murphy*, 844 F.2d 628, 632-33 (9th Cir. 1988). Implicit in the second element is causation. Failure to allege or establish these essential elements requires dismissal. A person subjects another to a deprivation of a constitutional right when committing an affirmative act, participating in another's affirmative act, or omitting to perform an act which is legally required. *Johnson v. Duffy*, 588 F.2d 740, 743 (9th Cir. 1978).

**A. FOURTEENTH AMENDMENT CLAIM**

To establish a Fourteenth Amendment due process violation, Plaintiff must allege a deprivation of a liberty or property interest by the government without due process. Property rights are defined by state law. *Portman v. County of Santa Clara*, 995 F.2d 898, 904 (9<sup>th</sup> Cir. 1993). Plaintiffs have not identified a deprivation of either property or liberty interest caused by Lt. Jasper. Construing Plaintiffs' allegations liberally, Lt. Jasper's questions do not rise to the level of a deprivation. Even inferring the fact that Lt. Jasper's questions caused Plaintiff's fear of loss of liberty or property, the "mere expectation" of a loss does not create either interest. *Id.* Plaintiffs' Complaint does not allege the essential elements of a Fourteenth Amendment due process claim.

To state a claim for a violation of the equal protection clause under the Fourteen Amendment, Plaintiffs must allege they are

1 members of a protected class or they were treated differently from  
2 other similarly situated persons, and the different treatment was  
3 for discriminatory purposes. *City of Cleburne, Texas v. Cleburne*  
4 *Living Center*, 473 U.S. 432 (1985); *Monteiro v. Tempe Union High*  
5 *School Dist.* 158 F.3d 1022, 1026 (9<sup>th</sup> Cir. 1998); *see also Snowden*  
6 *v. Hughes*, 321 U.S. 1, 8 (1944). Plaintiffs have failed to allege  
7 sufficient facts to show they were treated differently from other  
8 persons similarly situated or were members of a protected class.  
9 Significantly, they have failed to allege an intent by Lt. Jasper to  
10 unlawfully discriminate against them. These essential facts must  
11 be present to prove an equal protection claim under the Fourteenth  
12 Amendment. The facts alleged in the Complaint clearly show Lt.  
13 Jasper was questioning Plaintiffs out of concern for the inmate's  
14 safety, based on actions she observed in a video recording of  
15 Plaintiffs visit. ECF No. 1 at 3. Plaintiff neither alleges  
16 essential facts nor offers a cognizable legal theory as to how the  
17 facts alleged in their Complaint support an equal protection claim  
18 under the Fourteenth Amendment. Plaintiffs' Fourteenth Amendment  
19 claims, therefore, must be dismissed.

20 Construing the Complaint liberally, Plaintiffs appear to allege  
21 that Lt. Jasper's questioning without giving them a Miranda warning  
22 violated their 14<sup>th</sup> Amendment equal protection and due process rights  
23 by placing them in fear of losing their property in California,  
24 arrest and criminal conviction. (ECF No. 1 at 4.) These  
25 allegations taken as true are insufficient to establish either a  
26 liberty interest or property interest protected by the Constitution.  
27 As discussed below, a Miranda warning does not apply in the context  
28

1 of a civil action such as this.

2 **B. FIFTH AMENDMENT CLAIM**

3 The Fifth Amendment protects a defendant's privilege against  
4 compelled self-incrimination. *Miranda v. Arizona*, 384 U.S. 436, 439  
5 (1966). The court construes Plaintiff's allegations regarding a  
6 "Miranda Rights violation" as a violation of the Fifth Amendment  
7 right against compelled self-incrimination. (ECF No. 1 at 4.) A  
8 Miranda warning is an exclusionary rule to prohibit the use of  
9 compelled testimony by the prosecution in a criminal trial. *Oregon*  
10 *v. Elstad*, 470 U.S. 298, 306-07 (1985). A Miranda warning is not a  
11 constitutional right; it is a procedural safeguard created to inform  
12 an accused person of his right to remain silent, that any statement  
13 made may be used as evidence against him, and he has the right to  
14 the presence of an attorney. The right may be waived. *Miranda*, 384  
15 U.S. at 444. A constitutional issue does not arise until statements  
16 "obtained from a defendant questioned while in custody or otherwise  
17 deprived of his freedom of action in any significant way" are  
18 introduced against him at a criminal trial. *Id.*; *Cooper v. Dupnik*,  
19 924 F.2d 1520, 1528 (9<sup>th</sup> Cir. 1991). Plaintiffs do not allege that  
20 they were deprived of their freedom of action in any significant way  
21 when questioned by Lt. Jasper. There are no allegations of arrest,  
22 or appearance as defendants in a criminal trial where statements  
23 made during the encounter with Lt. Jasper were introduced as  
24 evidence against them. Miranda warnings are not required in the  
25 non-custodial situation described in Plaintiff's Complaint.  
26 Plaintiffs offer no cognizable legal theory or facts to support a  
27 Fifth Amendment claim. Therefore, dismissal of the construed Fifth  
28

1 Amendment claim is required.

2 **C. SIXTH AMENDMENT AND EIGHTH AMENDMENT CLAIMS**

3 Plaintiffs appear to allege a Sixth Amendment violation because  
4 they were not afforded the right to have an attorney present during  
5 their encounter with Lt. Jasper. (ECF No. 1 at 4.) The court  
6 construes this and other allegations concerning procedural rights of  
7 criminal defendants, such as right to counsel, as a Sixth Amendment  
8 claim. U.S.C.S. *Constitution Amendment 6 - Jury Trials*.<sup>1</sup> The  
9 Sixth Amendment details a defendant's rights to counsel "in all  
10 criminal prosecutions." *Id.* Sixth Amendment rights attach only to  
11 charged offenses, and not until formal criminal proceedings are  
12 initiated (*i.e.*, formal charge, preliminary hearing, indictment,  
13 information or arraignment). *See Texas v. Cobb*, 532 U.S. 162, 167-  
14 68 (2001). Plaintiffs do not allege the essential fact that they  
15 have been charged formally with a crime.

16 Regarding Plaintiffs conclusory allegation of an Eighth  
17 Amendment violation, ECF No. 1 at 4, no facts are alleged to support  
18 this claim. As is the case with the Sixth Amendment, the Eight  
19 Amendment protects criminal defendants by providing "[e]xcessive  
20 bail shall not be required, nor excessive fines imposed, nor cruel  
21 and unusual punishments inflicted." U.S.C.S. *Constitution Amendment*

---

22  
23 <sup>1</sup> Those protections include: right to a speedy and public  
24 trial, an impartial jury in the district where the crime was  
25 committed, right to be informed of the nature and cause for the  
26 charge, right to be confronted with witnesses, right to subpoena  
27 witnesses, and right to assistance of counsel. U.S.C.S. *Constitution*  
28 *Amendment 6*.

1 8. Construing Plaintiffs' Complaint liberally and admitting all  
2 allegations as true, there are no facts to support a Sixth Amendment  
3 or Eight Amendment claim. Therefore, dismissal of these claims as  
4 presently alleged is required.

5 Plaintiffs' Complaint fails to allege facts sufficient to state  
6 a claim under 42 U.S.C. § 1983. It also does not appear that  
7 amendment of the Complaint can cure its deficiencies. Nevertheless,  
8 as Plaintiffs are proceeding *pro se*, the court will give them the  
9 opportunity to submit an amended complaint as directed below.  
10 Ruling on the Motion to Dismiss is reserved for 60 (sixty) days.

11 **OPPORTUNITY TO AMEND COMPLAINT**

12 Unless it is absolutely clear that amendment would be futile,  
13 a *pro se* litigant must be given the opportunity to amend his  
14 complaint to correct any deficiencies. *Noll v. Carlson*, 809 F.2d  
15 1446, 1448 (9th Cir. 1987). Plaintiffs may submit an amended  
16 complaint within **sixty (60) days** of the date of this Order which  
17 includes sufficient facts to establish federal subject-matter  
18 jurisdiction. *Broughton v. Cutter Laboratories*, 622 F.2d 458, 460  
19 (9<sup>th</sup> Cir. 1980) (*citations omitted*).

20 Plaintiffs' amended complaint shall consist of a **short** and  
21 **plain** statement showing he is entitled to relief. Plaintiffs shall  
22 allege with specificity the following:

23 (1) the names of the persons who caused or personally  
24 participated in causing the alleged deprivation of their  
constitutional rights,

25 (2) the dates on which the conduct of each Defendant  
26 allegedly took place, and

27 (3) the specific conduct or action Plaintiff alleges is  
28 unconstitutional.



1 (4) whether named defendants are being sued in their  
2 individual or official capacity.

3 Furthermore, Plaintiffs shall set forth their factual  
4 allegations in separate numbered paragraphs. THIS AMENDED COMPLAINT  
5 WILL OPERATE AS A COMPLETE SUBSTITUTE FOR (RATHER THAN A MERE  
6 SUPPLEMENT TO) THE PRESENT COMPLAINT. Plaintiffs shall present  
7 their complaint on the form provided by the court as required by LR  
8 10.1, LOCAL RULES FOR THE EASTERN DISTRICT OF WASHINGTON. The amended  
9 complaint must be legibly rewritten or retyped in its entirety, it  
10 should be an original and not a copy, it may not incorporate any  
11 part of the original complaint by reference, and **IT MUST BE CLEARLY**  
12 **LABELED THE "FIRST AMENDED COMPLAINT"** and cause number CV-10-0465-CI  
13 **must be written in the caption.** Additionally, Plaintiffs must  
14 submit a copy of the "First Amended Complaint" for service on each  
15 named Defendant, and a copy for service on the State Attorney  
16 General. **PLAINTIFFS ARE CAUTIONED IF THEY FAIL TO AMEND WITHIN 60**  
17 **DAYS AS DIRECTED, THE COURT WILL DISMISS THE COMPLAINT WITH**  
18 **PREJUDICE.** Accordingly,

19 **IT IS ORDERED:**

20 1. Ruling upon Defendant's Motion to Dismiss pursuant to FED  
21 R. CIV. P. 12(c) (**ECF No. 21**) is **reserved for 60 (sixty days);**

22 2. **DISCOVERY IS STAYED** pending resolution of this matter.

23 The District Court Executive is directed to file this Order,  
24 provide a copy to Plaintiffs and counsel for Defendants, and send  
25 Plaintiffs a copy of LR 10.1.

26 DATED May 29, 2012.

27 S/ CYNTHIA IMBROGNO  
28 UNITED STATES MAGISTRATE JUDGE